Supreme Court of the United States

OCTOBER TERM, 1952

No. 540

UNITED STATES OF AMERICA, PETITIONER,

vs.

HARRY GRAY NUGENT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinion Below

The opinion of the Court of Appeals [85-91][1] is reported at 200 F. 2d 46. The trial court made no findings of fact or conclusions of law. [32, 37]

Jurisdiction

The judgment of the Court of Appeals was entered November 10, 1952. [91] An order extending the time to

[1] Figures appearing herein within brackets refer to pages of the printed Transcript of Record.

file the petition for writ of certiorari to January 9, 1953, was made. [97] The petition for writ of certiorari was filed January 8, 1953. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

Question Presented

Whether Section 6 (j) of the Selective Service Act of 1948, providing for investigation and appropriate inquiry, the Selective Service Regulations and the due process clause of the Fifth Amendment required the hearing officer of the Department of Justice, upon the hearing of respondent's claim for classification as a conscientious objector, to make available to him, at or before the hearing, the secret police report concerning his conduct as a conscientious objector, and whether the use of secret evidence without divulging it to respondent in making the recommendation against his claim to the appeal board deprives respondent of his rights guaranteed by the act, the regulations and the Constitution.

Statement

During September, 1948, respondent registered. He filed a questionnaire dated February 2, 1949. [5, 43-44] In his questionnaire he claimed conscientious objection to combatant military service. [5, 53] He stated that he would serve in the armed forces as a noncombatant conscientious objector. [5, 44] The local board failed to mail respondent the special form for conscientious objector (SSS Form No. 150) promptly but delayed the mailing of it for a period of twenty months. [6, 46-65]

Contrary to the statement appearing in the questionnaire that he would serve in the armed forces as a noncom-

batant [5, 44], respondent indicated in the conscientious objector form that he was opposed to both combatant and noncombatant service. [46-60] He explained that from the time he made his statement in the questionnaire in 1949 to the time that he filed his special form for conscientious objector in October, 1950, he had increased in his study and conviction of his religion, which made it impossible for him to serve as a noncombatant in the armed forces. [24-25, 33-37, 71-72]

On October 25, 1950, following the receipt of the special form for conscientious objector and supporting proof, the local board classified Nugent in Class I-A. [6-7] He was mailed notice of this classification. [7] On November 4, 1950, he requested a personal appearance. [7] Thereafter he had a physical examination and was found acceptable. [7] Nugent was notified to appear before the local board on February 1, 1951, for his hearing. [7-8] Following the personal appearance he was placed in Class I-A-O (noncombatant conscientious objector classification) making him liable for service in the armed forces. [8] On February 5, 1951, he was notified of this classification. [8]

Nugent appealed from this classification. [8-9] The appeal board tentatively denied his claim for classification as a full conscientious objector (IV-E) and referred the case to the Department of Justice for investigation and hearing pursuant to Section 1626.25 of the Selective Service Regulations (32 C. F. R. 1626.25). [9-10]

After the investigation by the Federal Bureau of Investigation of Nugent's claim as a conscientious objector, the case was referred to the hearing officer for a hearing. [66] The hearing officer notified Nugent to appear before him. [13] Accompanying the notice were printed instructions dated September 1, 1948. [13, 77-78] The instructions notified Nugent that the hearing officer would inform the registrant of the general nature and character of any evidence adverse to his conscientious objector claim. [77] The notice stated that the registrant could make a full pres-

entation at the hearing and bring witnesses. [78] The hearing was fixed for July 26, 1951. [21]

Pursuant to the instructions Nugent went to the office of the hearing officer and requested the adverse evidence. [42-43] The secretary of the hearing officer informed him that the "F.B.I. records are favorable" and that Nugent would have no trouble in getting his conscientious objector status. [15] When asked by the secretary if he was going to bring an advisor, he informed her that since the F.B.I. records were favorable he saw no need of it. She responded, "That is right, because I feel you should have no trouble in receiving your desired classification because of the good recommendation from the F.B.I." [15] Because of this, Nugent thought that it would be unnecessary to have anyone present to assist. [15] Because of the representation and good-faith belief, Nugent's advisor, Martin Mitchell, who would have corroborated his conscientious objector claim, did not attend the hearing. [17]

At the time fixed for the hearing Nugent appeared. [17-18] He was prevented by the hearing officer from making a full statement of his claim, being cut off and told to answer questions with yes or no. [18] At the hearing the hearing officer did not mention the F.B.I. report or any adverse statements appearing therein. [19, 92-96] The hearing officer had a stenographer present making a record. [21] The stenographic report of the hearing appears in the record. [92-96] In the report of the hearing officer made to the Department of Justice reference is made to the religious group to which Nugent belonged. The hearing officer said: "Apparently each member is entitled to his own belief. Registrant's belief seems to be a free and particularly easy belief and religion, calling for little effort and practically no sacrifice." [67] This information must have come to the attention of the hearing officer through the F.B.I. report because it was not touched upon at the hearing. [92-96] There was no proof of this in the conscientious objector form or the documents submitted. [56-65] The hearing

officer then added that Nugent's references "failed to make favorable impression, and most of them were conscientious objectors themselves". [67] This statement must have come from the F.B.I. report because none of the references appeared before the hearing officer but were interviewed by the agents of the F.B.I. [92-96]

The hearing officer refers to "impressions gleaned as to" Nugent. He added that Nugent was "apparently shiftless, lazy, somewhat of a moral weakling . . . ". [67] This information also must have come to the hearing officer's attention through the F.B.I. reports because it appears neither in the minutes of the hearing [92-96] nor the papers submitted by Nugent. [46-65]

The hearing officer impeached all of the statements made by Nugent and his references because none of them were made "prior to the national emergency" and, because of this fact, found that Nugent's claims "are not founded on truth in fact". [67] Notwithstanding his belief that the registrant should be denied both the conscientious objector classification to combatant military service (I-A-O) and to noncombatant military service (IV-E) making him liable for full military service and a classification of I-A, the hearing officer recommended that Nugent be put in Class I-A-O solely because the local board had placed him in that classification. [67]

The recommendation of the Assistant Attorney General, based on the report of the hearing officer and the secret police investigative report, recommended that the registrant be placed in Class I-A-O, or that his claim "be sustained as to combatant military service only, and the registrant if inducted into the land or naval forces be assigned to noncombatant duties". [68] The Assistant Attorney General referred specifically to the secret police report made by the F.B.I., stating that Nugent, according to the report, is "inclined to be lacking in ambition". [68-69]

The appeal board classified Nugent in Class I-A-O. [10] He was notified to report for induction. [12] He reported

and refused to submit, for which refusal he was indicted and convicted in the district court. [5]

Argument

I.

Petitioner contends that there is a conflict between the decision in the court below and *Imboden* v. *United States*, 194 F. 2d 508 (C. A. 6th), certiorari denied, 343 U. S. 957. (See page 11 of the petition for writ of certiorari filed herein.) There is no conflict between the two decisions.

In the *Imboden* case, *supra*, the registrant was satisfied with the facts supplied to him by the hearing officer appearing in the F.B.I. report. He was given an opportunity to answer the adverse evidence. His only complaint was that the hearing officer refused to give him the names and addresses of the informants. The refusal in the *Imboden* case, *supra*, doubtfully may be held to be valid under *Knock Jan Fat* v. *White*, 253 U. S. 454, 458-459.

The complaint here is much stronger. Secret, hearsay evidence was used against Nugent by the hearing officer and the Assistant Attorney General which was not made known to him. He had no opportunity to see the secret report that aided the Department of Justice in making an unfavorable recommendation. This was star-chamber proceedings in violation of that degree of fairness required of administrative agencies under the Fifth Amendment to the United States Constitution.

Imboden (194 F. 2d 508, certiorari denied, 343 U. S. 957) is confined to the particular *facts* of the *Imboden* case. It did not decide the F.B.I. report could not be demanded by the registrant either before or at the hearing. The holding of the Sixth Circuit is limited to the proposition that failure to identify informants was not a violation of procedural due process. There is a vast difference between merely withholding the names of informants and the use of ad-

verse evidence without giving the registrant an opportunity to combat, refute or answer the secret evidence.

Denial of certiorari in the *Imboden* case (194 F. 2d 508, certiorari denied, 343 U. S. 957) does not mean that the Court approved the holding of the Sixth Circuit. (See *Sunal v. Large*, 332 U. S. 174, 181, and *House* v. *Mayo*, 324 U. S. 42, 48.) Compare the remarks of Mr. Justice Frankfurter, dissenting, in *Darr* v. *Burford*, 339 U. S. 200, 227. The point involved in this case was not passed on by the Sixth Circuit.

It is respectfully submitted that there is no jurisdiction because of conflict between the holdings of the Sixth Circuit in the *Imboden* case, *supra*, and the Second Circuit in this case.

II.

The Government contends that the legislative history of the act or the background of the act (Section 6 (j) of the Selective Service Act of 1948, 50 U. S. C. App. § 456 (j), 62 Stat. 604, 612, 613) indicates an intention on the part of Congress to permit the use of the secret report without divulging it to the registrant. It is contended that the passage of the 1948 act, re-enacting as it did the pertinent provisions of the 1940 act, constituted Congressional approval of this illegal practice. The re-enactment of the 1940 act did not constitute approval *sub silentio* of the police state practice in the investigation and hearing of Nugent's claim.—See *Girouard* v. *United States*, 328 U. S. 61, 69-70.

A reading of the discussions and reports on the bills that became the 1940 act and the 1948 act fails to reveal any discussion on the use of the F.B.I. report. Only the subject of the statutory procedure for investigation and appropriate hearing was discussed under the 1940 act. It is alluded to by Senator Gurney in his opposition to the Morse amendment to the 1948 act, which would have taken the classification of conscientious objectors entirely out of the Selective Service System and placed it with a special civilian consci-

entious objector commission. (See 94 Cong. Rec. 7305, 7306.) Section V discusses Section 6 (j) of the 1948 act in Senate Report 1268, 80th Congress, Second Session, dated May 12, 1948, and says that the procedure for conscientious objector classification was "the same provisions as were found in subsection 5 (g) of the 1940 act".

Congress intended an "appropriate inquiry by the proper agency of the Department of Justice" and also "a hearing . . . with respect to the character and good faith" of the conscientious objections. (86 Cong. Rec. 12038, 76th Congress, Third Session. See also pages 17-18, House Report No. 2947, 76th Congress, Third Session, September 14, 1940.) In Senate Report 2002 on Senate Bill 4164, 76th Congress, Third Session, dated October 5, 1940, it was stated that the Congress intended to be "fair both to a person holding conscientious scruples against war and to the Nation of which he is a part".—Page 9.

In excess of the constitutional or statutory authority Attorney General Robert H. Jackson, under color of Order No. 3229, authorized by R. S. 161 (5 U. S. C. 22), held that the F.B.I. report on conscientious objectors was privileged and confidential and could not be revealed to the conscientious objector.—40 Op. A. G. No. 8, 1941.

The procedure outlined by the Department of Justice for the investigation and hearing of conscientious objector claims and the policy not to disclose the F.B.I. report to the registrant at or before the hearing is not "fair and just". —50 U. S. C. App. (Supp. V) 451. See also *United States* v. *Geyer*, 108 F. Supp. 70 (D. Conn., October 7, 1952).

While procedural fairness varies in accordance with the nature of the problem (*United States* ex rel. *Knauff* v. *Shaughnessy*, 338 U. S. 537), it has always been held that use of secret police reports and undisclosed evidence is a violation of procedural due process.—*Chew Hoy Qwong* v. *White*, 249 F. 869 (C. A. 9th); *United States* ex rel. *Eagles* v. *Samuels*, 329 U. S. 304; *United States* v. *Oller*, 107 F. Supp. 54 (D. Conn., July 28, 1952); *Joint Anti-Fascist Ref-*

ugee Committee v. *McGrath*, 341 U. S. 123; *Bailey* v. *Richardson*, 182 F. 2d 46 (C. A. 3rd), 341 U. S. 918.

It is submitted, in the absence of a clear intent on the part of Congress expressly stated, due process of law requires that at or before the hearing the F.B.I. report be produced and made available to the registrant.—Cf. *Estep* v. *United States*, 327 U. S. 114.

The restrictive judicial review and the refusal to allow a *de novo* hearing upon judicial review of a draft board determination require that the F.B.I. report be produced at or before the hearing in the Department of Justice. If there was a trial *de novo* on judicial review, then the aggrieved registrant could protect himself against secret evidence and the withholding of facts obtained through undisclosed police reports. *Estep* v. *United States*, 327 U. S. 114, restricted the defense and *Cox* v. *United States*, 332 U. S. 442, confined judicial review to the Selective Service file. In order to prevent denial of rights the courts must be astute to demand that the administrative requirements be strictly followed by the administrative agency. Restricted review for the registrant means restricted liberty for the administrative agency.—*Ver Mehren* v. *Sirmeyer*, 36 F. 2d 876 (C. A. 8th); *United States* v. *Zieber*, 161 F. 2d 90 (C. A. 3rd) See *Davis on Administrative Law*, Section 75, pages 268, 269, 272.

It is respectfully submitted that if respondent is to get the full and fair judicial trial permitted by *Estep* v. *United States*, 327 U. S. 114, he must, in view of the trial's being confined to the administrative record (*Cox* v. *United States*, 332 U. S. 442), be afforded an opportunity to see the F.B.I. report and have it included in the draft board files.—32 C. F. R. 1623.1 (b).

III.

It is contended by petitioner that the procedure stipulated for, which appears in the notice sent to the registrant by the hearing officer, [77-78] is sufficient. It is said by the Government that the supplying of a summary of the evi-

dence, either in advance or upon the hearing, is sufficient.

Neither the regulations nor the procedure adopted by the Department of Justice confines the consideration of the hearing officer of the Department of Justice to only the adverse evidence appearing in the summary that may or may not be given to the registrant by the hearing officer. Both the hearing officer and the Attorney General have available the complete report. How is the registrant to know that the hearing officer and the Attorney General confine their report and recommendation only to the summary given to the registrant? The procedure employed in this case is typical. The respondent was informed that there was no adverse evidence in the F.B.I. report. The hearing officer and the Assistant Attorney General relied on evidence in the file not given to Nugent. Any type of procedure other than a complete surrender of the F.B.I. report and placing it in the file will never insure uniformity of treatment. As long as only the hearing officer and the Attorney General have the F.B.I. report, how are the registrant and the appeal board to know that the Department of Justice may not have relied on other evidence appearing in the report? Since it is the prerogative of the appeal board either to accept or to reject the Department of Justice recommendation, the F.B.I. report ought to be available to the registrant so that the recommendation can be tested and checked by the facts that the Department of Justice had before it.

The court below properly held that Nugent was entitled to decide for himself, by an examination of the F.B.I. report itself, whether there was any or other evidence that he should rebut. This cannot be left solely in the hands of the Department of Justice. The procedure described in the notice sent to the registrant by the hearing officer [77-78] is entirely inadequate. It leaves an open and uncontrolled field in the hands of the Department of Justice to administer the law. It is not fair, just or adequate for the registrant, the appeal board and the court not to have available the F.B.I. report to test the validity of the Department of Jus-

tice recommendations. The probing and the weighing of the recommendation of the department cannot be effectively accomplished unless and until the F.B.I. report is produced and made a part of the file.

It is suggested that because the recommendation of the Department of Justice is advisory and the appeal board can reject it, the failure to produce the F.B.I. report is harmless, inasmuch as the final classification is made by the appeal board. (See *Imboden* v. *United States*, 194 F. 2d 508, certiorari denied, 343 U. S. 957.) While the recommendation is only advisory, this does not make the illegal withholding of the F.B.I. report harmless. In every case where the conscientious objector claim is denied, the F.B.I. report is relied upon by the department, whose recommendation in turn is relied on by the appeal board. Since the withholding of the F.B.I. report vitiates the departmental procedure, it also would nullify the appeal board procedure.

The records of the Department of Justice and the Selective Service System show that over 90 per cent of the recommendations made by the department to the appeal boards are accepted and in most instances, where the departmental recommendation is rejected, it is because the conscientious objector claim has been recommended and the appeal board places the registrant in Class I-A. In practically every case where the conscientious objector claim is recommended against, the appeal board follows the recommendation.—See "Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1944", page 13.

It is submitted that because the recommendation is only advisory it does not validate the illegal proceedings in the Department of Justice when the appeal board accepts and follows such recommendations.

IV.

In the absence of cases where national security will be endangered the privilege granted under Order No. 3229 of the Attorney General, pursuant to 5 U. S. C. 22, must yield to the requirements of due process in order to insure a full and fair hearing. Divulgence of the F.B.I. report in the case of ordinary conscientious objectors would never affect national security.

United States ex rel. *Touhy* v. *Ragen*, 340 U. S. 462, is not in point. There the Government was not a party to the proceedings. It was an outside party, attempting to pry into Government records, that was involved.—Cf. *Reynolds* v. *United States*, 192 F. 2d 987 (C. A. 3), where *United States* ex rel. *Touhy* v. *Ragen*, *supra*, is distinguished.

The situation here is similar to that presented in *Bank Line* v. *United States*, 163 F. 2d 133 (C. A. 2nd); *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2nd); *United States* v. *Krulewitch*, 145 F. 2d 87 (C. A. 2nd); *United States* v. *Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La. 1949), affirmed by an equally divided Court, 339 U. S. 940 (1950); *United States* v. *Schine Chain Theatres*, 4 F. R. D. 108 (W. D., N. Y. 1944); and *Zimmerman* v. *Poindexter*, 74 F. Supp. 933, 935 (D. Hawaii, 1947). In any event it is for the administrative agency rather than the Department of Justice to determine whether the report is properly withheld.—Cf. *E. I. duPont de Nemours Powder Co.* v. *Masland*, 244 U. S. 100.

Conclusion

While the question presented is of national importance sufficient to warrant a decision by this Court, it is so obvious that the judgment of the court below is plainly right

that, it is respectfully submitted, the petition for writ of certiorari should be denied.

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